PD-0867-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/15/2019 1:22 PM
Accepted 2/19/2019 10:36 AM
DEANA WILLIAMSON
CLERK

No. PD-0867-18

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
2/19/2019
DEANA WILLIAMSON, CLERK

Troy Allen Timmins
Appellant

v.

The State of Texas
Appellee

On Appeal from the 198th District Court of Bandera County in Cause No. CR-16-153; the Hon. M. Rex Emerson, Judge Presiding, and the Opinion of the Fourth Court of Appeals in Case No. PD-0867-18, Delivered January 22, 2014.

State's Brief

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Identity of Parties and Counsel

Pursuant to the Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Criminal Appeals.

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Note Regarding Abbreviations & Hyperlinks

In this brief, Appellant refers to the Clerk's Record as "CR" followed by the appropriate page: e.g., "(CR 123)." Appellant refers to the Reporter's Record as "RR" followed by the volume, page and line numbers: e.g., "(RR Vol. 3, P. 47, L. 12-15). Additionally, in this brief, Appellant utilizes hyperlinks to cited opinions. Where possible, the hyperlink will be to the posted opinion on the particular court's website. All other hyperlinks are to a copy of the opinion on the Google Scholar site.

State's Brief

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, Appellee in the above styled and numbered cause, by and through her duly elected District Attorney, and respectfully files the State's Brief, and would show the Court as follows:

The Ground on Which Review was Granted

In an issue of first impression, did the court of appeals correctly determine that the evidence is legally sufficient to support a conviction for "failure to appear & bail jumping" when a trial court revokes a defendant's bail in open court, remands the defendant to jail, and the defendant fails to report to jail as ordered?

The State's Counter Point

The Court of Appeals Correctly Determined That the Evidence Was Legally Sufficient to Support a Conviction for Failure to Appear and Bail Jumping Because Appellant Was Actually Released from Custody in Open Court and He Failed to Appear in Accordance with the Terms of His Release, Which Was to Report to the Jail after Taking His Mother Home.

Relevant Facts

(From the Opinion of the Court of Appeals)

After being involved in a car accident, appellant Troy Allen Timmins was indicted in Bandera County for manslaughter and criminally negligent homicide. He was arrested and subsequently released from confinement on bail. The State moved to revoke Timmins's bail, alleging he had used drugs in violation of the conditions of his bail bond. The trial court set a hearing on the State's motion. Because Timmins could not drive and believed he

> would not be taken into custody, Timmins had his elderly mother drive him from San Antonio to Bandera County for the hearing.
>
> At the hearing, the trial court revoked Timmins's bond, but allowed Timmins to accompany his mother on her return to San Antonio. The trial court ordered Timmins to report to the Bandera County jail by 3:00 p.m. later that same day. Timmins accompanied his mother to San Antonio, but did not subsequently report to the Bandera County jail as ordered.

See ***Timmins v. State***, _____ S.W.3d _____ (Tex.App. - San Antonio; No. 04-17-00187-CR; July 18, 2018)(slip op. at 2).

Summary of the State's Argument

The evidence was legally sufficient to support Appellant's conviction for Bail Jumping and Failure to Appear because he was actually, physically, constructively, and unequivocally "released" from custody in open court for the purpose of taking his mother home before he was to be incarcerated for alleged violations of the terms of his bail bond release. Use of the regular and normal meaning of the terms "released" and "appear" is warranted under standards of statutory construction, common sense, public policy, and plain English; to conclude otherwise would lead to an unjustified and absurd result. Further, the evidence was legally sufficient to show that Appellant failed to appear "in accordance with the terms of his release, as he was ordered prior to that release to "appear" at the Bandera County Jail at 3:00 P.M., and it is undisputed that Appellant did not appear at the jail as ordered.

Courts in Texas need not resort to stretched and convoluted definitions of common and ordinary words ("release" and "appear") to give effect to legislative intent in legal analysis and statutory construction, especially when to do so would be contrary to the legitimate penological goals of our criminal justice system.

Argument & Authorities

> We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is: "(1) wordy, (2) unclear, (3) pompous, and (4) dull."

Richard C. Wydick, *Plain English for Lawyers*, 66 Calif. L. Rev. 727 (1978).[1]

The *meaning* that Appellant seeks to place upon the ordinary and common plain English words "release" and "appear" fit squarely within the above statement, and look backwards to the past in legal writing technique and style. Appellant seeks to have "release" turned on its head -- that when a person is free to leave the courthouse without handcuffs or even accompaniment by a law

[1] See also, Richard C. Wydick & Amy E. Sloan, *Plain English for Lawyers* (6th ed. 2019).

enforcement officer -- that he is, in "Texas legal parlance,"[2] in constructive custody. That is an arcane[3] premise that leads to an absurd result in this case.[4] Appellant additionally seeks to modify the simple word "appear" to mean only to appear at a court proceeding. Again, an arcane premise is made, with an absurd result.

As quoted by the Court of Appeals in this case, Section 38.10 of the Texas Penal Code provides that "[a] person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear *in accordance with the terms of his release*." ***Timmins***, slip op. at 7. Appellant's arguments seek to twist the English language using a strained analysis to improperly narrow the plain meaning and scope of the words "release" and "appear" in the statute considered by the Court of Appeals.

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[2] Appellant merits brief at 19.

[3] Arcane means "[u]nderstood by few; mysterious or secret;" see Oxford Living Dictionaries; or "known or knowable only to a few people;" see *Merriam-Webster Dictionary*; and "complicated and therefore understood or known by only a few people;" see *Cambridge English Dictionary* (on-line dictionaries, accessed February 15, 2019).

[4] That the usage is called arcane is important in the "Conclusion" section below - How shall the population be charged with knowledge of the law when it is arcane?

I. **"Release"**

Appellant brings his argument under an insufficiency of the evidence theory. ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979). Under the standard of review for sufficiency of the evidence, the Court looks to "whether, after viewing all of the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Villa v. State***, 514 S.W.3d 227, 232 (Tex.Cr.App. 2017).[5] Appellant argues he was in custody and not "released", when in fact, to a hypothetically average and rational juror, he clearly was released from custody.

Appellant was released to leave the courthouse, released without handcuffs, released without a law enforcement officer escort, and even released without an electronic GPS ankle monitor. Because the trial judge released Appellant to take his mother home, without any restraint whatsoever, no rational juror could conclude other than that Appellant had been released from custody.

Appellant argues that the proper charge would have been Escape.[6] Had Appellant been tried for escape on these facts, the State would have been hard

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[5] First citing ***Jackson***, 443 U.S. at 307; then citing ***Liverman v. State***, 470 S.W.3d 831, 835-836 (Tex.Cr.App. 2015).

[6] Appellant's merits brief at 20.

pressed to be able to convict the Appellant. Imagine the jurors' blank stares if, at trial, the State had argued that Appellant "escaped" when the evidence showed he was released from custody, with permission for that release being given by the trial court judge. If this had been tried as an escape case, then the defense would merely argue that there was no escape committed because the judge had allowed him to leave. That is the common sense plain English interpretation with which a rational jury would agree.

II. **"Appear"**

As part of Appellant's insufficiency of the evidence argument, he further claims that, since he was ordered to appear at jail, rather than appear at court, the conviction must fail. Appellant relies in part on an unpublished memorandum opinion from one of the lower courts in a juvenile case that was, in essence, dealing with an escape charge relating to a post-conviction furlough order rather than a pre-trial release. See ***In re B.P.C.***, No. 03-03-00057-CV (Tex. App. - Austin May 27, 2014).[7] The Court of Appeals below correctly concluded that the ***B.P.C.*** court's conclusion, that failing to appear implied failing to appear at a

[7] ***BPC*** was a juvenile proceeding wherein the disposition phase followed an adjudication phase and is equivalent to a post-conviction procedural posture. See Fam. Code §§ 54.03 (a), (h)-(j); §§ 54.04 (a), (d)(2)-(3)(seriatim "post-adjudication").

later court proceeding, was dicta. ***Timmins***, slip op. at 4. Further, ***B.P.C.*** is distinguishable not only because it dealt with an escape charge and not a failure to appear charge, but also because it was based upon on the methodology of the release used in that case. In ***B.P.C.***, the Third Court of Appeals wrote that the "detention order provided that appellant was to remain in the State's custody until he had successfully completed the Leadership Academy's program, and his confinement was suspended only briefly, to be resumed as soon as the leave was over. *Appellant was not released and ordered to appear. . ..*" ***B.P.C.***, slip op. at 2 ("Charge of Escape" paragraph)(emphasis added). By contract, in this case, the trial court did not order Appellant to remain in custody with his confinement suspended only briefly as in ***B.P.C.***, Appellant was actually released and ordered to appear at the jail. He never appeared, thus consummating the offense.

III. **Statutory Construction**

Appellant and the Fourth Court of Appeals, believing the word "appear" to be ambiguous, embarked upon a course of statutory and legislative intent analysis. The State asserts that such an analysis is of academic interest, but not necessary to the disposition of this issue according to the arguments postulated above.

Issues of statutory construction are a question of law, which are reviewed *de novo*. ***Liverman***, 470 S.W.3d at 836; ***Prichard v. State***, 533 S.W.3d 315, 319-320 (Tex.Cr.App. 2017). In construing a statute, this Court should give effect to the plain meaning of its language, "unless the statute is ambiguous or the plain meaning would lead to absurd results that the legislature could not have possibly intended." ***Liverman***, 470 S.W.3d at 836; ***Prichard***, 533 S.W.3d at 319-320.

> In determining plain meaning, the courts should "employ the rules of grammar and usage, and presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible." If a word or a phrase has acquired a technical or particular meaning, it should construe the word or phrase accordingly. [Only] If, after using these tools of construction, the language of the statute is ambiguous, the court can resort to extra textual factors to determine the statute's meaning. "Ambiguity exists when the statutory language may be understood by reasonably well-informed persons in two or more different senses." "Extra textual factors include but are not limited to: (1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision."

Liverman, 470 S.W.3d at 836; ***Prichard***, 533 S.W.3d at 319-320.

As asserted above, the usage of "release" and "appear" in this case was not ambiguous at all, and those words should be given their plain meaning. To use

the definitions claimed by Appellant would lead to absurd results the legislature could not have intended -- in this case, to allow no consequences following the disobedience of a court order to appear and surrender at the jail.

In further support of his statutory construction arguments, Appellant claims that in "Texas legal parlance" the word appear has incorporated by definition the additional technical words "for a court proceeding". He cites to many cases wherein a defendant failed to appear for a court proceeding and the conviction was upheld. That many cases would involve failing to appear for court is not surprising. However, the different factual bases of those cases demonstrate that they cannot be dispositive of the facts of this case.

Appellant argues that the court below concluded that the word "appear" had acquired a highly technical meaning and that, therefore, the technical meaning should be given effect and that the analysis should end there.[8] However, the Fourth Court, citing to Black's Law Dictionary, noted "[a]ppear *can* be used in a technical sense to mean "coming into court as a party or interested person." ***Timmins***, slip op. at 4 (emphasis added). "Can" is not "shall" -- especially so in regard to a word so broad in scope as the common word "appear." If Appellant's

[8] Government Code § 311.011.

claim that the word "appear" has clearly morphed into "appear in a court proceeding" by legions of cases, then this case could not be a case of first impression. This case is procedurally unusual for the reason that the Appellant is claiming that the exercise of judicial discretion and leniency, that he himself requested, was improper. Such a complaint comes up very rarely as shown by the fact, recognized by the court below, that this is a case of first impression.

In correctly construing Penal Code § 38.10(b), the controlling statute, the court below pointed out that subsection (b) discusses "appearances" incident to community supervision, parole or intermittent sentences as a defense to prosecution. That distinction leans in favor of "appear" having a broad definition in subsection (a).

Appellant next urges that an analogous failure to appear statute in the Transportation Code § 543.009 (a) & (b) controls the outcome in this case. Appellant argues here that Transportation Code § 543.009 has been held by this Court to be *in pari materia* with Penal Code § 38.10, and therefore, appear must be in court. See ***Azeez v. State***, 248 S.W.3d 182 (Tex.Cr.App. 2008); see also ***Timmins***, slip op. at 11.

Both Transportation Code § 543.009 and Penal Code § 38.10 deal with failing to appear. In the Transportation Code provision, however, the addition of the words "in court" after the word "appear" in that statute demonstrates the contrary construction of the statute at issue in this case, i.e., that "appear" can be in places other than court. Note that Transportation Code § 543.009(a) &(b) uses the phrase "appear in court" twice, while Penal Code § 38.10(a) uses the more broad language of failing to "appear in accordance with the terms of his release." Though this Court has held these two provisions to be *in pari materia*, the provisions of each can be given effect. "But even when statutes are construed to be *in pari materia*, 'any conflict between their provisions will be harmonized, if possible, and effect will be given to all the provisions of each act if they can be made to stand together and have concurrent efficacy.'" ***Liverman***, 470 S.W.3d at 837, quoting ***Jones v. State***, 396 S.W.3d 558, 561-562 (Tex.Cr.App. 2013).

Finally, in regards to the several public policies involved, to hold that "release" can still be "confinement" and that "appear" can only be "at a court proceeding," would render judicial economy negated and public policy abrogated. It would be impractical and wasteful to require a trial court to set another hearing for a defendant to appear to be taken into custody and would

unduly restrict judicial discretion to allow a defendant a brief period of time to get his affairs in order in the interests of justice.

Using hyperbole, Appellant claims that a contrary holding would open a "veritable" "Pandora's Box" of rogue judges pushing unwarranted failure to appear charges. In fact, Appellant claims that the"Potential judicial free for all that would have a cascading effect."[9] Such conclusory allegations without citing authority do not carry weight or merit consideration.

Conclusion

Pursuant to Penal Code § 8.03(a) ("It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect"), all Texans are presumed to know the law, and Mistake of Law is generally not a defense. Under Appellant's rationale, Texans would be charged with knowing highly technical "Texas legal parlance"[10] that renders common sense and ordinary meanings of words a nullity. The public cannot be expected to know that a "release" and going free do not constitute being "released," and that one is still "in custody" while freely driving their mother down the highway.

[9] Appellant's merits brief at 25.

[10] Appellant merits brief at 19.

Additionally, the public cannot be expected to know that being ordered "to appear in accordance with the terms of his release" means nothing at all unless ordered to appear at a court proceeding? "Plain English" is a good thing, whether one refers to use by lawyers or the manner in which our statutes are to be construed.

In this case, the only rational conclusion is that the evidence was legally sufficient to support a conviction for failure to appear and bail jumping when Appellant was actually released from custody on his promise to appear in accordance with the terms of his release, i.e., to report to the jail, and he failed to do so. The judgments of the courts below should be affirmed.

Prayer

WHEREFORE, PREMISES CONSIDERED, the undersigned, on behalf of the State of Texas, respectfully prays that this Honorable Court will review this brief and upon submission of the case to the Court will affirm the judgment and conviction of the court below.

Respectfully Submitted,

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Certificate of Compliance and Delivery

This is to certify that: (1) this document, created using WordPerfect™ X9 software, contains 2,972 words, excluding those items permitted by Rule 9.4 (i)(2)(B), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro.; and (2) on February 15, 2019, a true and correct copy of the above and foregoing "State's Brief" was transmitted via the eService function on the State's eFiling portal, to Patrick Maguire (mpmlaw@ktc.com), and Ryan Kellus Turner (rkellus@gmail.com), counsel of record for Appellant.

David A. Schulman